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Supreme Court, U.S.
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No. 97-566

In The

Supreme Court of the United States

October Term, 1997

GABRIEL RUBINSTEIN,

Petitioner,

vs.

RAMAPO COLLEGE OF NEW JERSEY, EDWARD SAIFF, ROBERT A. SCOTT, JAMES KELLETT, ROBERT HATALA, and EDWARD CODY,

Respondents.

On Petition for a Writ of Certiorari to the New Jersey Superior Court, Appellate Division

REPLY BRIEF FOR PETITIONER

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RESTATEMENT OF THE CASE

In November 1985 a departmental memo to faculty detailed improvements in secretaries' work habits as suggested by petitioner. On January 8, 1986, based solely on ex-parte communications initiated by the Personnel Director with one of the secretaries, he concluded in a covert report to her that petitioner had committed sexual harassment. Petitioner was disciplined by him, both verbally and in writing, to cease and desist — contrary to respondents' claims. (Res. 1, 5). Petitioner was later formally informed that the secretary could file her dormant charge from 1985 at the college till 1991. The Affirmative Action Office, rather than Personnel, addresses all such allegations and its written time limitation was two weeks.

In April 1988, when petitioner returned from his first sick leave, faculty intervention led to the Personnel's Director's futile attempt to retrieve the report from the college officials. At that meeting they denied his statement to them concluding that sexual harassment has occurred.

Upon legal intervention, the Vice-President of Operation, Planning and Finance finally convened a postponed hearing on October 27,1989 only to be unexpectedly terminated as soon as it began despite petitioner's protests. Petitioner rejected the Vice President's conclusion of no probable cause, dated January 5, 1990, since it was issued only to him and without any findings, an investigation or a hearing. The President refused to issue a full retraction of the 1986 report.

In late October 1988 the secretary and a faculty member alleged to others at the college that petitioner was mentally unfit to teach there. On December 7, 1988 petitioner filed grievances against his accusers with the Affirmative Action Office based on the President's verbal and written recommendation of December 2 and 12, 1988.

On December 21,1989 petitioner sought redress of his formal grievances from the Affirmative Action Office. It was summarily rejected for lack of jurisdiction after an ex-parte investigation rather than a mandated meeting of the parties. On January 11, 1990 petitioner appealed to the President.

On Monday, January 22, 1990, petitioner returned to work from his sick leave as approved by the Director of his department on January 19, 1990. He was then unexpectedly ordered (compare Res. 2 and 7) by the Vice-President for Academic Affairs not to teach that day and until a psychological evaluation was concluded; no notice or any hearing were given at any time. The five, not one (Res. 2), weeks evaluation found no reason for the suspension and petitioner was not paid his salary. On January 23, 1990, the petitioner was notified that he could take legal action since the President would not have the college address his grievances, no reasons were given. Except for the January 19, 1990 matter, the dates cited by respondents are incorrect. (Res. 2, para. 1).

In August 1990 the Vice-President for Academic Affairs formally approved petitioner's sick leave request for the fall semester unilaterally continued by respondents in January 1991. Contrary to respondents' claims, (Res. 2), all of petitioner's leaves were either approved or authorized by the Vice-President. In November 1990 petitioner filed three separate Workers' Compensations' claims after the President denied his August Sick Leave Injury application in October 1990. Respondents' restatement and omissions of material facts is reprehensible and misleading to this Court.

Petitioner limits his counter statement of historical facts as they relate to the question of the number of claims or occurrences in the actions below.

REPLY TO RESPONDENTS' ARGUMENTS

Respondents' argument that *res judicata* is a bar to petitioner's instant theories for relief under 42 U.S.C. § 1983 because they had been adjudicated by the District Court represents a change in position from that taken below and contrary to the New Jersey Appellate Division's finding that they were not. (App. A at 4a), (Res. at 5, 8).

The District Court's decision was not final for *res judicata* purposes since it was not responsive to all the relevant issues nor did it represent the completion of all the steps in the adjudicative process.

The District Court did not adjudicate the instant § 1983 theories since it did not apply existing law to the facts. *Cf., Dist. of Col. Court of Appeals v. Feldman*, 460 U.S. 462, 477, 479 (1983). Both respondents and the Appellate Division failed to demonstrate that the theories were disposed of "on the basis of a dispositive issue of law." (Res. 6-7, 8); *Nietzke v. Williams*, 409 U.S. 319, 326 (1989). Thus, since the substantive merits of the instant § 1983 theories were not adjudicated, and since respondents did not incur the inconvenience of preparing to meet them, their reassertion in the state action is not precluded by *res judicata*. *C.f., Costello v. United States*, 365 U.S. 265, 286 (1961); *See also* 27A, *Federal Procedure*, L. Ed., *Pleadings and Motions*, § 62:608 at 355; 46 Am. Jur., Judgments, § 607 at 880. "It is not the form of a ruling, nor how it was induced, but the substance that lays the cornerstone of *res judicata*." *Id.* § 583 at 860. Since the District Court did not grant respondents' motion to dismiss the entire case with prejudice, its decision is potentially subject only to issue rather than claim preclusion, and petitioner did not reassert the explicitly decided § 1983 theories in the state action. *C.f. Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 327 (1954); no relitigation occurred of the instant § 1983 theories. *Compare*, (Res. at 6).

Further, *res judicata* is inapplicable to a claim which, as here,

is independent of that previously and partially adjudicated, *i.e.*, the suspension and harassment claims. Contrary to respondents' contention, (Res. 5, 7), the multiple claim argument was presented by petitioner below but respondents instead acquiesced to the Appellate Court's *de novo* analysis which erred in ignoring the argument. Respondents' reliance on the cause of action test, (Res. at 9), is "unnecessary grudging" for it is the claim or the factually-based transaction standard which is used by the federal courts in the context of *res judicata*. *Cf.*, *Nevada v. United States*, 483 U.S. 110, 130 N. 12 (1983).

Respondents' argument that only one claim is at issue cannot be sustained by its undifferentiated chronology which arbitrarily tied together two distinct factual basis as one. (Res. 3, 6, 9). The historical factual grouping noted above constitute conveniently separate administrative or judicial proceedings or trial units based on different claims, transactions or occurrences. The sexual harassment matter, and related harassment claim, arose from the Personnel Director's conduct in 1986. The controversy was to be resolved via a hearing by the Vice President for Operation, Planning and Finance. It explicitly excluded all facts related to petitioner's filed grievances in 1988 alleging, *inter alia*, a defamatory handicap discrimination charge. In January 1990 petitioner was involuntarily suspended by the Vice-President of Academic Affairs based solely on the circumstances surrounding petitioner's attempt to return to work from his sick leave which suspension required a hearing by the Board of Trustees. N.J.S.A. 18A:6-18.1,-20.

As in this typical retaliation claim, embodied in the suspension claim or transaction, petitioner filed grievances based on one set of facts and wrong causing respondents to unexpectedly suspend him for seeking their redress, precipitating a second harm on a different and distinct set of facts and controversy. *See* Wright, Miller & Cooper, *Federal Practice*, § 4409 at 81 and n.22.

Thus, whether the suspension claim itself constitutes separate

transactions, it is clear that respondents' acts in 1986 regarding the sexual harassment matter did not cause the 1990 suspension. Contrary to respondent's contention, several, not one, intervening and distinct acts and events cause separated harms to petitioner. "A new claim or cause of action is created as the conduct continues." *Id.* at 77. Notably, the Appellate Division characterized petitioner's state handicap discrimination theory as a new cause of action, (App. A. at 5a), even though the proposed amended complaint added no new facts.

> Under the circumstances, whether [respondents'] conduct be regarded as a series of individual [constitutional] torts or as one continuing tort, the [ ] [prior decision] does not constitute a bar to the instant suit.

Lawlor, supra, at 328.

Since there has been no final judgment on the merits of the instant § 1983 theories of relief and since they relate to an independent claim or transaction from that adjudicated by the District Court, they are not barred by *res judicata.*

Respectfully submitted,

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